89-1120

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Case No. _____

Supreme Court Of The United States

October 1989 Term

Elenor M. Catalina,

Petitioner

vs.

City of Columbus, Ohio
Tom Moody, Mayor
Hugh Dorrian, Auditor
David Ort, Treasurer
The Columbus Municipal Civil Service Commission
Thelma Schoonover, Chairperson
John C. Young, Member
Earl Murray, Member

Respondents

PETITION FOR WRIT OF CERTIORARI

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Where a jury specially finds discriminatory, deliberate discharge of a 64 year old, 22 years service, white, civil service employee for, "A NEED TO HIRE MORE BLACKS AND WOMEN FOR A BALANCE TO MEET LAWS", but renders a general verdict for the city on the issues of discrimination on the basis of age and race, and the district court grants judgment for the city, does the Court of Appeals, by upholding such action, depart so far from the accepted course of judicial proceedings as to call for this court's power of supervision to enter judgment for Plaintiff, or to grant a new trial?

2. Has the United States Court of Appeals for the Sixth Circuit, by upholding such action, acted in conflict with the law recognized by other federal courts

of appeal and The United States Supreme Court so as to require corrective action by this Court?

3. In an action tried by a jury, for age discriminations under 29 U.S.C. 621-634 and for reverse race discrimination under 42 U.S.C. 1981, which is tried along with Plaintiff's claims of race, sex and retaliation discrimination under 42 U.S.C. 2000 (e), with advisory interrogatories, may the court disregard the specific written jury findings of reverse race discrimination and substitute its judgment of the facts in rendering judgment under 42 U.S.C. 2000 (e)?

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GROUNDS FOR JURISDICTION

The United States Constitution, Article III, Section 1, vests judicial power in one supreme court, which, under Section 2, shall extend to all cases under the laws of the United States. Plaintiff asserts violation of employment rights under the Age Discriminations in Employment Act, 29 U.S.C. Sec. 621-634; Title VII, 42 U.S.C. Sec. 2000 (e) and under the Civil Rights Act of 1866, 42 U.S.C. Sec. 1981. Review of CCA 6th action is available under 28 U.S.C. Sec. 2101 (c) by Petition for Certiorari. The Seventh Amendment guarantees a fair trial, which was subverted in this case by failure of the trial and appellate court to recognize jury findings of discharge to meet affirmative action goals.

STATEMENT OF THE CASE

Plaintiff, Elenor M. Catalina, at age 64, was discharged from her 22 years of classified civil service employment as a Personnel Analyst of The Columbus Municipal Civil Service Commission. After exhausting administrative remedies, she filed a complaint in the United States District Court, Southern District of Ohio, asserting age discrimination under 29 U.S.C. Sec. 621-634, reverse race discrimination under 42 U.S.C. 1981, sex, race and retaliation discrimination under 42 U.S.C. 2000 (e), due process and equal protection violations under the Fourteenth Amendment and 42 U.S.C. 1983 and Revenue Sharing Act violations.

The District Court, on motion of the City, applied a one year statute of lim-

itations retroactively to the 42 U.S.C. 1983 claims. Upon the representation of the City that it was not receiving revenue sharing money at the time of the trial, no evidence of discriminatory use of federal funds at the time of discharge was introduced by plaintiff.

The claims of reverse race discrimination in promotion and discharge and of age discrimination, were tried to a jury, which also heard the evidence as to sex discrimination. The court devised a form for the jury to sign which required answers to special interrogatories as to whether the jury found employment discrimination on the basis of race, sex or age, and if so, whether it was done knowingly, intentionally and deliberately.

In the same document the jury was

instructed to render a general verdict on the issues of age and race discrimination.

The jury was asked to answer the following Interrogatory 4:

> "Do you find by a preponderance of the evidence that the racial discrimination practiced was done knowingly, intentionally and deliberately?"

The court, on receiving responses to all interrogatories, stated (Trial Transcript page 24, JOINT APPENDIX page 24):

> "Everything is no and for defendant except the answer to Question 4, 'Do you find by a preponderance of the evidence that the racial discrimination practised was knowingly, intentionally and deliberately?' Signed yes with a note: A need to hire more blacks and women for a balance to meet laws--which I am going to interpret as consistent

with a finding for the defendant on the issue of race discrimination. Would you have a different view on that? You may look at the form Mr. Holmes?"

The court thereafter returned the case to the jury under Rule 49(b) for further consideration "...and to give an explanation that that answer is not consistent (sic) with the other questions on the subject and/or with the general verdict which was for the defendant on the issue of race discrimination." The court, without objection, gave the jury written instructions as follows (Trial Transcript page 24, JOINT APPENDIX pages 24-25):

"As the answer to Question 4 does not follow the answers 2 and 3 and answer 4 is inconsistent with the general verdict for the defendant on the issue of race discrimination, you shall return and deliberate with the intention to remove these inconsist-

> encies; the racial discrimination must relate to the plaintiff, Mrs. Catalina."

The jury retired again but quickly returned. The court announced that the jury had changed the answer to Question 4 from "yes" to "no", but did not announce that the jury had not altered its findings, written out beside answer "4", that the action of the city was for, "A need to hire more blacks and women for a balance to meet laws." (Transcript pages 30-31, JOINT APPENDIX pages 154-155).

The court then found for the city on the Title VII sex discrimination claim and discharged the jury without reviewing the jury writings with counsel as had been done earlier.

Only after the jury had been dis-

charged did the court permit plaintiff's counsel to be heard. Plaintiff's counsel immediately moved for judgment for plaintiff, or for mistrial, based on the clear intentions of the jury, written in by them, to further the affirmative action program even at the expense of deliberate discharge of Mrs. Catalina. (Transcript pages 33-35, JOINT APPENDIX 157-159).

On appeal the Sixth Circuit found that:

> "...the initial inconsistency between the general verdict and the responses to the special interrogatories was cured by the district court, and further finds that Catalina waived her objection to any perceived inconsistency by failing to enter any objection to the special verdict form returned by the jury before the jury was discharged. Catalina's failure to make such an objection in a timely fashion deprived

> the trial court of the opportunity to correct discrepancies, if any existed, in the form of the verdict returned by the jury.."

However, the JOINT APPENDIX submitted to the Sixth Circuit Court, showed that the trial judge had not disclosed that the jury, after further instructions, had not stricken its written, "justification" for discharge, that there was, "A need to hire more blacks and women for a balance to meet laws."

On appeal to the Sixth Circuit, plaintiff argued that the initial finding of discharge to achieve racial goals entitled plaintiff to judgment; that the finding was binding on the court as to Title VII claims and that the court erred in handling the jury special findings of discharge, "to meet laws."

REASONS FOR ALLOWANCE OF WRIT

CONFLICT WITH OTHER COURTS OF APPEAL

Procedural

The Seventh Circuit held, in Elliot vs. Watkins Trucking Co., 406 F. 2d 90 CCA 7th (1969), that the answer to a special interrogatory, by which the jury found contributory negligence, controlled and precluded a general verdict for plaintiff. Under this principle a special jury finding, written in, of discharge to meet a need to hire blacks and women to meet laws, was a specific finding of discrimination that should have required entry of judgment for plaintiff as to liability.

The Fifth Circuit, in the case of Phillips Chemical Company vs. Hulbert, 301 F. 2d 747 (CCA 5)(1962), held that where a jury found no malice, in a

special interrogatory, but gave a general verdict as if it had found malice, the original special finding controlled. The issue of malice could not be sent back to the jury. Defendant was entitled to judgment. The court said:

> "However, having thereafter been informed by the court that this special answer could not stand with its hard wrought general verdict, no imagination was required to predict that the jury would likely change its answer to the interrogatory rather than see its general verdict fall."

In Mrs. Catalina's case the jury specially found discrimination against Mrs. Catalina, "to-meet laws," both when the issue was first considered, and even after reconsidering what the judge characterized as an "inconsistent" special finding. The jury left in its written

finding, "to meet laws," language when returning its verdict a second time.

In Aquachem Co. Inc. vs. Olin, 699 F. 2d 516 (CCA 11)(1983), the initial response of a jury to a special finding controlled. The court rejected the argument that a mere clerical error had occurred and did not send the case back to the jury as did the trial judge in Mrs. Catalina's case, after hearing a "clerical error" argument from the city.

The Sixth Circuit is at variance with other circuits on the procedural question of the force to be given a special finding which is clearly inconsistent with a general verdict.

The Sixth Circuit is also in conflict with the Second Circuit, which recognized, in Schaafsma vs. Morin Vermont Corp., 802 F. 2d 629, 634 (CCA 2)

(1986), that even if trial counsel has not objected, where the jury clearly misapprehends the law (in that case the difference in damages for rescission as contrasted to damages for fraud), the court has an independent duty to prevent a miscarriage of justice.

In Mrs. Catalina's case the trial court well knew that the jury found race discrimination in discharge against Mrs. Catalina. The trial judge also knew that the jury thought that such race discrimination was required, "to meet laws," and continued to think that way even after the trial judge told them to make matters "consistent."

This is not a "plain error" or "waiver," case, because plaintiff's counsel was not allowed to see the verdict form, before discharge of the jury, when

it was returned a second time with the words, "..to meet laws," still on it. But the principle involved in the "plain error," concept applies; namely that the court should not permit the jury to misapprehend the law.

In Edwards vs. Mayes, 385 F. 2d 369, 373 (CCA 4)(1967), the 4th circuit invoked "plain error," where instructions plainly misstated controlling principles. But the Catalina case is worse. The erroneous controlling principle was twice clearly stated by the jury with the court's approval, namely the mistaken belief that, legally, a senior employee could be discharged "to meet laws." The judge fostered that, "plain error," by not disclosing the repeated jury language to plaintiff's counsel before he discharged the jury.

Wholly aside from the "waiver," claim, or review of the way the trial judge handled the "to meet laws," language, it is clear that other circuits grant a new trial where the application of substantive law is unclear. In Saunders vs. State of Rhode Island, 731 F. 2d 81 (CCA 1)(1984), where the substantive law as to the care of inmates was not clear at time of trial, and was only clarified after the jury had been discharged, the court held that the failure to give complete and adequate jury instructions required a new trial under Rule 49(b).

The Fourth Circuit reversed where there was a clearly erroneous instruction of law, that recovery was possible on a counterclaim only if the plaintiff could not prevail in its claims in Miller vs.

Premier Corp., 608 F. 2d 973 (CCA 4) (1979).

The First Circuit case of Boston Chapter NAACP et al vs. Beecher et al, 716 F. 2d 931 (CCA 1) (1983), illustrates that in that circuit, at least, the disastrous effects of financial damage to senior white employees, who are discharged to meet affirmative action goals, is a matter of such great public concern that the State of Massachusetts passed a law reinstating senior policemen and firemen who had been discharged. It was only because of that law that the First Circuit could find racial discrimination issues moot but, the Sixth Circuit would ignore the loss of Mrs. Catalina's job and retirement benefits.

SUBSTANTIVE LAW CONFLICTS

The trial judge stated that a gene-

ral verdict for the city, coupled with a finding of deliberate discrimination in discharge, "to meet laws," was in his view a legal jury finding for the city on the issue of discrimination. He upheld an altered jury verdict form which retained a finding that discharge was "to meet laws." In this the trial judge and reviewing court are in conflict with McDonald et al vs. Santa Fe Trail Transportation Co. , 427 U.S. 273, (CCA 5) (1976), which held that white persons as well as black persons were protected against racial discrimination in employment under both Title VII and 42 U.S.C. 1981.

The trial judge and the Sixth Circuit are also in conflict with the Second Circuit case of Bridgeport Guardians, Inc. Inc. vs. Bridgeport Civil Service

Commission, 482 F. 2d 1333 (CCA 2)(1973), which held that while entry level policemens' jobs could be subject to a quota favoring non-whites, validated promotional exams, where seniority had been achieved by Whites, could not be subject to quotas favoring Blacks.

SUPREMACY OF SUPREME COURT

In the case of Firefighters Local Union No. 1784 vs. Stotts, 467 U.S.C. 561 (1984), on certiorari from the Sixth Circuit it was necessary for this court to reverse the 6th Circuit court approval of a City of Memphis affirmative action plan which would have violated the seniority rights of white firefighters, in a layoff situation. So, the principle of not discharging senior white employees to advance affirmative action plans for blacks was well known to the Sixth Circuit; but

enforcement of the principle was sought to be evaded by both the trial court and the Sixth Circuit by not reporting that the jury retained the written finding of discharge "..to meet laws," on reconsideration.

In Wygant et al vs. Jackson Board of Education et al, 476 U.S.C. 267 (CCA 6) (1986), it was necessary for this court to grant certiorari to reverse a Sixth Circuit judgment which would have permitted senior white teachers in Jackson, Michigan to be laid off in order to achieve affirmative action goals.

The trial judge and the 6th Circuit have acted clearly at variance with Baccia vs. Board of Education, 451 Fed. Suppl. 882 (1978), where the individual was protected from discharge done incident to achieving affirmative action

goals.

The trial judge and the 6th Circuit have acted contrary to the principle set out in United Steelworkers of America AFL-CIO vs. Weber et al, 443 U.S. 193, 61 L. Ed. 2d 480 (1969), where the court said:

> "At the same time the plan does not unnecessarily trammel the interests of white employees. The plan does not require the discharge of white workers and then replacement with new black hires."
> (underlining supplied)

The trial judge and 6th Circuit have acted contrary to the principles carefully carved out by this court in University of California Regents vs. Baake, 438 U.S.C. 265 (1978), where, at page 299 this court said:

> "Third, there is a measure of inequity in forcing innocent

> persons in respondent's position to bear the burdens of redressing grievances not of their making."

Mrs. Catalina, who worked as a Personnel Analyst for the Columbus Municipal Civil Service Commission, a senior person with 22 years of civil service, is precisely the kind of person that other federal circuit courts of appeal have found to be entitled to protection against reverse discrimination. Though the other circuits decisions involve senior union members, the principle is the same, and just as vital for Mrs. Catalina and millions of other individual public employees who entered public service upon the promise that by good and efficient service, usually for 30 years, they could build up security for their later years of work and thereafter for

their retirement.

The Greek philosopher Solon said that a society is good only if it treats its least powerful member the same as its most powerful citizens. Baake and Weber demanded respect for individual rights. The other circuit courts have respected individual rights. This circuit, faced with two jury writings saying that affirmative action goals shall prevail over individual rights, has not protected the individual. This is particularly bad in Mrs. Catalina's case. As a senior Personnel Analyst of the civil service system itself, her premature discharge sent a clear signal that civil service tenure provides no protection against pressures from groups, Black, White, Hispanic, Asian, foreign nationals, or members of religious groups who would

take the senior civil service person's job, without serving the apprenticeship and without compensating the discharged employee for monumental loss of future earnings and retirement benefits.

It may be attractive to cities to promise jobs to various groups. It may be a good thought for appellate courts to uphold lower courts if possible, but it is not a principle recognized by the United States Supreme Court that individual rights of senior employees can be brushed aside to advance affirmative action goals, as was knowingly condoned and facilitated in this case.

This case also involves the question, not yet settled by this Court, as to whether a jury finding of deliberate racial discrimination, "to meet laws" is binding on the federal judge

in deciding Title VII rights, which include protection against racial discrimination, though sex discrimination was not found by the jury. In Williamson vs. Handy Button Machine Company, 817 Fed. 2 1290 (CCA 7)(1987), it was held that jury findings were binding on the trial judge where Sec. 1981 and Title VII issues were tried together.

A P P E N D I X

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

ELENOR M. CATALINA,
Plaintiff,

-v- Case No. C2-80-628

CITY OF COLUMBUS,
Defendant.

GENERAL VERDICT

We the jury find for the *DEFENDANT on the issue of race discrimination.

We the jury find for the *DEFENDANT on the issue of age discrimination.

* Please write in either plaintiff or defendant (Regardless of your answers to the above questions, please answer the following questions)

JURY INTERROGATORY

1. Do you find by a preponderance of the evidence that the plaintiff's race was a motivating factor in the defendant's decision to discharge the

plaintiff?

Yes _____ No __X__

2. Do you find by a preponderance of the evidence that the plaintiff's race was a motivating factor in defendants' decision to not promote the plaintiff.

Yes _____ No __X__

3. Do you find by a preponderance of the evidence that the racial discrimination in defendants' decision to promote the plaintiff occurred after 1976?

Yes _____ No __X__

4. Do you find by a preponderance of the evidence that the racial discrimination practiced was done knowingly, intentionally and deliberately?

Yes __X*__ No __X*__

*A notation was handwritten beside these answers, "A need to hire more blacks & women for a balance to meet laws."

APPENDIX II

5. Do you find by a preponderance of the evidence that the plaintiff's age was a determining factor in the decision to discharge plaintiff?

Yes _____ No __X__

6. Do you find by a preponderance of the evidence that the age discrimination practiced in regard to Elenor Catalina's discharge was done knowingly, intentionally, and deliberately?

Yes _____ No __X__

7. Do you find by a preponderance of the evidence that plaintiff's sex was a motivating factor in the defendants' decision to discharge the plaintiff.

Yes _____ No __X__

8. Do you find by a preponderance of the evidence that plaintiff's sex was a motivating factor in defendants' deci-

sion to not promote the plaintiff.

Yes _____ No X

9. Do you find by a preponderance of the evidence that the sexual discrimination in the defendants' decision to promote or discharge the plaintiff occurred after 1972.

Yes _____ No X

10. Do you find by a preponderance of the evidence that the sex discrimination practiced was done knowingly, intentionally and deliberately.

Yes _____ No X

(signed) Foreperson

(signed)

(signed)

(signed)

(signed)

(signed)

Date: Oct. 25, 1988

APPENDIX IV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

ELENOR M. CATALINA

V.

THE CITY OF COLUMBUS, ET AL.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C-2-80-628
Judge Smith

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing and that the action be dismissed on the merits.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant recover of the plaintiff his costs of action.

October 26, 1988
Date

KENNETH J. MURPHY
Clerk

(signed)
(by) Deputy Clerk
Adriann M. Stuart

APPENDIX V

TITLE VII JUDGMENT RENDERED FROM BENCH

Trial Transcript, page 31

Joint Appendix, page 155

Interrogatory 4, the answer is no.*

Interrogatory 5, the answer is no.

Interrogatory 6, the answer is no.

Interrogatory 7, the answer is no.

Interrogatory 8, the answer is no.

Interrogatory 9, the answer is no.

Interrogatory 10, the answer is no.

Signed by the six jurors.

Ladies and gentlemen, are these your signatures on the verdict form?

ENTIRE JURY PANEL: Yes, your Honor.

THE COURT: Do you wish me to poll the jury, Mr. Holmes?

MR. HOLMES: I don't believe so, your Honor.

THE COURT: Thank you very much. The Court, based on the direction and advis-

ory decision by the jury on Questions 7, 8, 9 and 10 regarding sex discrimination, finds for the defendant on the Title VII claim.

If the defendant City of Columbus Civil Service Commission will present proposed findings of fact and conclusions of law to the Court on that issue, that will be forthcoming. We would like to have that in the next two weeks, if that is possible, unless other arrangements are made.

Mr. Holmes, if you wish to reply to that in any way, you have every right to.

MR. HOLMES: Yes, sir.

* ("Yes" was changed to "No". The trial court did not report that the jury did not cross out, "A need to hire more blacks and women for a balance to meet laws," see Appendix II.)

APPENDIX VII

No. 88-4187/4089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELENOR M. CATALINA, Plaintiff-Appellant,	) ON APPEAL) FROM THE) UNITED STATES
v.	) COURT FOR THE) SOUTHERN
CITY OF COLUMBUS, Defendant-Appellee.	) DISTRICT OF) OHIO

Decided and Filed Oct. 17, 1989

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges and HARVEY, District Judge*

PER CURIAM. Plaintiff-appellant, Elenor M. Catalina (Catalina), has appealed from the entry of judgment against her pursuant to a jury verdict finding that defendant-appellee City of Columbus, Ohio (Columbus) had not discharged her from Columbus's civil service in violation of the Civil Rights Act of 1861**, 42 U.S.C.

*Hon. James Harvey, Senior District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

**In error on original document should read 1866.

Sec. 1981, Title VII, 42 U.S.C. Sec. 2000(e), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. Secs. 621-634.

On appeal, Catalina has argued that the jury's general verdict was inconsistent with one of its answers to a series of special interrogatories and that, therefore, the case should be remanded for a new trial. This court finds that the initial inconsistency between the general verdict and the responses to the special interrogatories was cured by the district court, and further finds that Catalina waived her objection to any perceived inconsistency by failing to enter an objection to the special verdict form returned by the jury before the jury was

discharged. Catalina's failure to make such an objection in a timely fashion deprived the trial court of the opportunity to correct discrepancies, if any existed, in the form of the verdict returned by the jury.

For the foregoing reasons, the district court's entry of judgment in favor of Columbus in accordance with the jury's general verdict is hereby AFFIRMED.

ISSUED AS MANDATE: November 8, 1989

APPENDIX X

STATUTES

42 U.S.C. 1981

Sec. 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 2000e-2

Sec. 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer---

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because such individual's race, color, religion, sex or national origin.

29 U.S.C. 623

Sec. 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer---

(1) to fail to refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

CERTIFICATE OF SERVICE

This will certify that three copies of the foregoing Petition For Writ of Certiorari was delivered to the office of Ronald J. O'Brien, Columbus City Attorney, attorney for respondents and their successors in office, on January 10, 1990.

Robert D. Holmes
Attorney for Petitioner

Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELENOR M. CATALINA
Petitioner,

v.

CITY OF COLUMBUS, OHIO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED FOR REVIEW

I. Does the Sixth Circuit's decision, that the trial court properly cured an initial inconsistency between the jury's general verdict and its responses to special interrogatories, conflict with decisions from other federal courts of appeal; sanction a departure from the accepted usual course of judicial proceedings; or decide a federal question in conflict with applicable decisions of this Court?

II. Did the trial court disregard specific findings of the jury and substitute its own judgment regarding Title VII issues in conflict with decisions from other circuit courts of appeal, or in conflict with applicable decisions of this Court?

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NO. 89-1120

IN THE

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OCTOBER TERM, 1989

ELENOR M. CATALINA

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v.

CITY OF COLUMBUS, OHIO, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

This Court has jurisdiction to review the final judgment of the Sixth Circuit Court of Appeals under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Petitioner, Elenor M. Catalina, filed her complaint in United States District Court for the Southern District of Ohio, Eastern Division, claiming that she was unlawfully terminated from her employment with the City of Columbus on September 29, 1978, and otherwise discriminated against on the bases of her sex, race and age. She sought remedies pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981, Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e), the Age Discrimination in Employment Act, 29 U.S.C. § 621-634, the Equal Pay Act, 29 U.S.C. § 206(d), and the State and Local Fiscal Assistance Act, 31 U.S.C. § 6716(b).

Petitioner withdrew her claims under the Equal Pay Act and the State and Local Fiscal Assistance Act prior to trial.

Trial commenced on October 17, 1988. Petitioner's claims under 42 U.S.C. § 1981 and the Age Discrimination in Employment Act were tried to the jury. Petitioner's Title VII claims were tried to the court. The trial court sought an advisory verdict on the issue of sex discrimination from the jury.

The verdict form, the jury's completion of the same, and the trial court's action in response are all central to an understanding of what occurred in this case. The Respondents' proposed verdict form and drafts of the trial court's verdict form all contained instructions for each of the jury interrogatories indicating whether succeeding interrogatories were to be answered by the jury. In all drafts, the question as to whether Respondents' decision not to promote, or to discharge Petitioner were motivated by her race, was followed by an instruction indicating that if the answer was "no", the jury was to ignore the question whether the discrimination was done knowingly, intelligently and deliberately. The structure of the form was

approved by all counsel.

The final verdict form was prepared by the trial court. The court's clerk removed the instructions between the questions without the approval of the parties or the court.

The jury returned the verdict form making findings for Respondents on the general verdicts regarding the issues of race and age. The jury also found for Respondents on all interrogatories with the exception of interrogatory number 4 which related to whether Respondents knowingly, intentionally and deliberately discriminated based on race. In the margin beside that interrogatory, the jury wrote the words: "A need to hire more blacks & women for a balance to meet laws." The trial court returned the jury to further deliberate and resolve the inconsistency between its general verdict and its response to interrogatory number 4. [Pet.App.I - IV].

The jury, upon returning from its second deliberation, found in favor of Respondents in response to all questions on the verdict form. [Pet. App. I - IV]. The trial court gave Petitioner the opportunity to poll the jury and she declined. The trial court proceeded to discharge the jury without objection.

The trial court concurred with the jury and found for Respondents on Petitioner's Title VII claims. Judgment was accordingly entered for Respondents on October 26, 1988. [Pet. App. I - IV].

On November 4, 1988, Petitioner filed various post trial motions for judgment on her behalf notwithstanding the jury verdict and for judgment on her behalf regarding her Title VII claims.

The court found Petitioner's Title VII motion to be moot in view of its judgment for Respondent dated December 5, 1988 and overruled Petitioner's motion for judgment notwithstanding the verdict.

Petitioner subsequently appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Ap-

peals affirmed the District Court's entry of judgment in favor of Respondents in accordance with the jury's general verdict in its decision of November 8, 1989. [Pet. App. I - IV].

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit's decision did not conflict with decisions from other federal courts of appeal; did not sanction a departure from the accepted usual course of judicial proceedings; and did not decide a federal question in conflict with applicable decisions of this Court.

Petitioner contends that the Court of Appeals' determination that the trial court properly cured an inconsistency between the jury's general verdict and its initial response to a special interrogatory conflicts with decisions with other circuits and decisions of this Court.

Rule 49(b) of the Federal Rules of Civil Procedure is applicable in cases such as this in which general verdicts are accompanied by interrogatories. The rule clearly states that "[w]hen the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." A jury is therefore properly sent back for further consideration when its answers to special interrogatories are inconsistent with each other and one or more is inconsistent with the general verdict. *Blackwell* v. *Cities Service Oil Company*, 532 F.2d 1006 (5th Cir. 1976).

The Court of Appeals found that the District Court properly sent the jury back for further deliberation to eliminate the inconsistency. Such a finding is consistent with Rule 49(b) and the decision cited above from the Fifth Circuit.

While Petitioner contends that the decision below conflicts with other circuits' decisions, a close reading of those decisions cited by Petitioner reveals that they do not support such a contention. Petitioner cites *Elliott* v.

Watkins Trucking Company, 406 F2d 90 (7th Cir. 1969) for the proposition that when the jury finds facts that are inconsistent with the general verdict, then judgment should be entered based on the specially found facts. The court's decision in *Elliott* is not inconsistent with the Sixth Circuit's finding in this case. The court in *Elliott* was faced with a situation where it was impossible to reconcile the answer to the special interrogatory with the general verdict. In that case, there was a general verdict in favor of the plaintiff in a negligence action, but there was also a special finding of comparable negligence on the part of the defendant. Because this case took place in a jurisdiction where a finding of comparative negligence would totally bar recovery in a negligence action, the two findings were not reconcilable. There is no problem of irreconcilable findings in the current case. The final answers to each interrogatory were clearly consistent with the general verdict.

Petitioner cites *Aquachem Co. Inc.* v. *Olin Corp.,* 699 F.2d 516 (11th Cir. 1983) as controlling here because the trial court in that case found the jury's answer to a special interrogatory regarding damages to be controlling. Without reciting the myriad differences between the facts of *Aquachem* and those in the instant case, it is submitted that the import of the decision in *Aquachem* to this case is that a court may, within its discretion, amend a special verdict after it is rendered, to make it conform to the jury's obvious, but unexpressed intention. If the trial court here had followed *Aquachem,* it could have chosen to amend the initial answer to interrogatory number 4 to match the jury's obvious intent to find for Respondents on the issue of race discrimination. Instead, the trial court wisely decided to follow the options set forth in Federal Rule 49(b).

Petitioner also cites the Fifth Circuit's decision of *Phillips Chemical Company* v. *Hulbert,* 301 F.2d 747 (5th Cir.

1962) as being in conflict with the decisions below. That case recognizes that it is within the court's discretion whether to enter judgment on a special interrogatory, to order a new trial, or to return the jury for further deliberation when the answers to the interrogatories are consistent with one another. In the *Phillips* case there was an issue relating to missing critical jury instructions; no such issue is involved in this matter. Further, the answers to the interrogatories here were inconsistent with one another.

In *Schaafsma* v. *Morin Vermont Corp.*, 802 F.2d 629 (2nd Cir. 1986), the court simply stated the "plain error rule" in a case involving a problem with jury instructions. There was no "plain error" in this case and no issues have been raised alleging faulty jury instructions. Petitioner also attempts to cite in her favor two other cases, *Edwards* v. *Mayes*, 385 F.2d 369 (4th Cir. 1967) and *Miller* v. *Premier Corp.*, 608 F.2d 973 (4th Cir. 1979) wherein plain error was found due to defective jury instructions. None of these cases are remotely applicable to this matter.

In *Saunders* v. *Rhode Island*, 731 F.2d 81 (1st Cir. 1984) the case involved an error where the applicable law was unclear at the time the jury was instructed. That case also is simply not applicable to this matter. There were no problems with the jury instructions or the jury's understanding of the law. The only source of confusion for the jury, in this case, was the verdict form and interrogatory number 4, which as a result of missing instructions, asked the jury to assume discrimination had occurred.

None of the cases cited by Petitioner demonstrates that the decision in this case conflicts with any decisions from other circuits. Further, Petitioner cites no decision from this Court which conflicts with the decision below. Clearly there has been no demonstration that the Sixth Circuit sanctioned a departure from the usual course of judicial proceedings so as to call for this Court's intervention. The

Court of Appeals simply sanctioned that which is permitted by Federal Rule 49(b) and recognized by other circuits.

Petitioner attempts to frame the Court of Appeals decision as one which decides a federal question in a manner which is in conflict with decisions of this Court. Petitioner would have the Court believe that this case somehow relates to "reverse discrimination" in which she was discharged as a result of affirmative action for non-whites. This matter does not involve such a situation.

The issue here is whether the Court of Appeals correctly determined that the trial court acted properly in dealing with a conflict in the answers on the verdict form. This case is not one where a white person was discriminated against in order to favor non-whites. For that reason, the decisions which Petitioner cites regarding "reverse discrimination" are clearly not applicable to this case.

The jury in this matter made a marginal notation: "A need to hire more blacks & women for a balance to meet laws". To assign a specific meaning to this notation is speculative at best. There is nothing which indicates that the statement referred to Petitioner at all. The notation appears beside an interrogatory which, due to a clerical error, is phrased so as to assume discrimination took place. As a result, the notation could be simply an attempt to explain that which the jury was asked to assume. In any event, if the statement is to be construed at all, it must be construed as being consistent with the general verdict. *Gallick* v. *Baltimore and Ohio Railroad*, 372 U.S. 108 (1963).

The Court of Appeals further found that Petitioner had waived her objection to any perceived inconsistency by failing to enter an objection to the verdict form returned by the jury before the jury was discharged. If no timely objection is made relative to any alleged inconsistency of

its special finding and both parties acquiesce in the court's discharging of the jury, any objection to the general verdict on the grounds of an inconsistency with a special finding is waived. *Tennessee Consolidated Coal Company* v. *United Mine Workers of America*, 416 F.2d 1192 (6th Cir. 1969). See also, *Fernandez* v. *Chardon*, 681 F.2d 42 (1st Cir. 1982); *Walker* v. *Sinclair Refining Company*, 320 F.2d 302 (3rd Cir. 1963); *Stancill* v. *McKenzie Tank Lines*, Inc., 497 F.2d 529 (5th Cir. 1974); *Strauss* v. *Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987); and *Phillipine National Oil Company* v. *Garrett Corp.*, 724 F.2d 803 (9th Cir. 1984).

The Sixth Circuit obviously is not in conflict with the other circuits on this issue. Neither is it in conflict with any decisions of this Court. Further, Petitioner has failed to cite any authority to the contrary.

Petitioner raises for the first time in her petition that she did not waive her ability to object to any inconsistency in the verdict form due to the fact that the trial court did not show Petitioner's counsel the verdict form prior to discharging the jury. Petitioner's assertion is untenable. Her counsel was well aware of the handwritten notation prior to the jury's being sent back to deliberate a second time. When the trial court read aloud the answers to the general verdict and special interrogatories upon the jury's return, Petitioner's counsel had ample opportunity to determine whether the marginal statement had been removed. Further, Petitioner's counsel had the opportunity to poll the jury regarding its verdict. Also, Petitioner's counsel clearly had the opportunity to object to the discharge of the jury until he had had an opportunity to review the verdict form. As a result of said inaction, Petitioner has clearly waived her right to object at this time.

Further, it is this Court's general policy not to decide issues or questions not raised or litigated in the lower courts. *Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987).

II. The trial court did not disregard specific findings of the jury and substitute its own judgment regarding Title VII issues.

Petitioner claims that the trial court ignored "specific written jury findings" and substituted its own judgment with regard to the Title VII issues tried to the court. Petitioner cites the case of *Williamson* v. *Handy Button Machine Company*, 817 F.2d 1290 (7th Cir. 1987) for the proposition that jury findings are binding on the trial judge in cases where 42 U.S.C. § 1981 issues and Title VII issues are tried together.

The Court of Appeals did not specifically address this issue. Perhaps it is because the trial court did exactly what Petitioner claims the trial court should have done. The trial court followed the findings made by the jury in its answers to the interrogatories. For that reason, there was no error on the part of the trial court; nor was there error in the Court of Appeal's affirmation of that decision.

Presumably the "specific written jury findings of reverse discrimination" referenced by Petitioner is the unexplained marginal notation discussed above. Said notation is hardly a specific finding let alone one of "reverse discrimination." The jury marked "no" to interrogatory number 4 finding for Respondents. The jury clearly found for Respondents on all issues. The trial court's finding for respondent on Title VII issues obviously was consistent with the jury's findings. There is no "question" here to be settled by this Court as alleged by Petitioner.

CONCLUSION

Supreme Court Rule 10 requires that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." The reasons asserted by Petitioner fail to justify review by this Court. This Court has indicated that an issue must be more than just "academic" or "episodic". *Rice* v. *Sioux City Memorial Park Cemetary,* Inc., 349 U.S. 70 (1955). It is submitted that the facts of this case relating to the clerical error in the verdict form are unique and not likely to recur. Further, it is submitted that the trial court properly exercised its discretion with regard to the options provided in Federal Rule 49(b); and that the Sixth Circuit properly sanctioned the trial court's action. Moreover, Petitioner has waived any objection to any perceived inconsistency between the general verdict and responses to the interrogatories.

Accordingly, Respondents respectfully urge this Court to deny the petition for writ of certiorari to United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas K. Browell, hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was hand-delivered to the office of Robert D. Holmes, Counsel of Record for Petitioner, 16 East Broad Street, Columbus, Ohio 43215, on February 9, 1990. I further certify that all parties required to be served have been served.

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